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by
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> [California] has pioneered the use of bounty-hunting litigation by private parties to enforce public policy.[1]

Introduction

Do you have a grievance? Has a particular business or industry upset you? Even if you have not suffered any actual injury, if you live in California—you're in luck. You may be able to sue under the California Business and Professions Code section 17200, California's Unfair Competition Act [hereinafter "UCL" or "17200"],[2] and your chances of convincing an attorney to represent you are surprisingly good. Partly due to its grant of attorney's fees for successful suits and partly due to the vast uncertainty as to what may qualify as a UCL cause of action, this statute has become one of the favorites of the plaintiff's bar. "Many believe that the past decade has seen a boom in such [UCL] claims."[3] Stan Ulrich, of the California Law Revision Commission, said that, "[a]lthough I can't prove it, I believe there's a huge underground economy in 17200 claims."[4]

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1. Tim W. Ferguson, *The Lawsuit Business*, FORBES, May 18, 1998, at 110 (citation omitted).

2. CAL. BUS. & PROF. CODE §§ 17200-17209 (West 1997 & Supp. 2001).

3. Sheila Muto, *Unfair Competition Law Faces High-Court Scrutiny*, WALL ST. J., Nov. 3, 1999, at CA3.

4. *Id.*

The abuse of the UCL by plaintiffs is becoming gradually more apparent with each new frivolous lawsuit filed under the guise of unfair competition. Consider the following examples of suits based upon a UCL cause of action: A suit that alleged unfair competition because a company packaged computer software in "containers that were filled to substantially less than their capacity."[5] The maker of Pokemon trading cards was accused of corrupting the nation's youth by promoting gambling.[6] Tonka Corporation and Toys 'R Us were sued because their advertisements for their "Easy Bake" oven claimed a ten-minute baking time, but this did not allow for time to mix the snack powder or pre-heat the oven.[7] A cereal company was sued because it claimed that its "Honeycomb" and "Alpha-Bits" products were cereals—the plaintiff contended they should be labeled candies.[8] "A common thread runs through all these lawsuits: They were initiated by lawyers, not injured consumers, and they all seek court ordered attorney fees. The only beneficiaries of these cases, most of which settle for a nuisance value, are the lawyers who bring them."[9] In light of the potential for UCL abuse, it is not surprising that one of the agenda items on a recent plaintiff lawyers' annual retreat was "How Business and Professions Code Section 17200 Can be a 'Value Added' Component of Your Litigation."[10]

Beyond a quest for attorney's fees, there is a second characteristic shared by all of the aforementioned UCL cases; a plaintiff deemed an act to be 'wrong' and sought relief through the UCL. One must be mindful, however, of the distinction between an act that is considered by an individual to be morally or ethically repugnant and an act that is (or should be) proscribed by law. The UCL is quickly becoming a statute that can be used to enforce one's own notions of right and wrong. The judiciary in this state has tacitly condoned the idea of basing a UCL cause of action solely upon a violation of public policy. It is the Author's contention that this

5. Intervention Inc. v. Symantec Corp., No. C96-04477 (Contra Costa County Super. Ct. filed Oct. 9, 1996); *see also* Del Stewart, *The Latest Kind of Amazing Lawsuits*, SAN DIEGO UNION TRIB., Sep. 18, 1997, at B-11; John H. Sullivan, *Call it Gonzo Law: The Unfair Competition Statute Covers any Claim, if it's Presented with a Straight Face*, CAL. L. BUS., Jan. 10, 2000, at 22.

6. Sullivan, *supra* note 5, at 22.

7. *Id.*

8. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660 (Cal. 1983).

9. Stewart, *supra* note 5, at B-11.

10. Sullivan, *supra* note 5, at 22.

would result in a disastrous state of vigilantism and judicial uncertainty.

This Note will discuss the problems associated with a statute that allows a plaintiff to enforce his own particular notions of desirable public policy. Part I will discuss the flaws of the UCL itself, namely its vague statutory language and over-inclusive standing requirement. These shortcomings in the UCL have allowed private actors to use the statute to advance their own policy goals. Part II tracks this phenomenon through three California Supreme Court UCL cases, showing how the shortcomings of the UCL were manipulated to enforce a private policy agenda. Part III will then examine the language and trends from the past UCL cases to predict the future of public policy in UCL jurisprudence if steps are not taken by either the California Supreme Court or the California Legislature to correct existing problems. Finally, Part IV offers some suggestions to alleviate the current trend of UCL abuses.

I. UCL Problems

A. Vague Statutory Language

The UCL prohibits unfair competition, and states that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice."[11] The statute was originally enacted to codify the common law prohibition on name infringement.[12] In 1933 the statute was amended to "include 'unfair or fraudulent business practices' as well as false advertising."[13] Throughout the early period of its existence, even though the statutory language was vague, the law was still primarily used to combat name infringement.[14]

> In 1963 the Legislature again amended [the UCL] to add "unlawful" business practices to the list of proscribed conduct. In doing so, it expanded the definition of unfair competition with respect to conduct violating statutory prohibitions, for now any

11. CAL. BUS. & PROF. CODE § 17200.

12. Seong Hwan Kim, *California's Unfair Competition Act: Will It Give Rise to Yet Another 'Wave' in Smoking and Health Litigation?*, 35 SANTA CLARA L. REV. 193, 198-99 (1994); Wesley J. Howard, Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705, 707 (1979).

13. Howard, *supra* note 12, at 706.

14. *See id.* at 707.

business practice that violated an independent statutory duty was an instance of unfair competition.[15]

Finally, "[i]n 1992 the Legislature expanded the scope of the unfair competition law to include unfair business *acts* as well as *practices* . . . . This change did not alter the meaning of [the UCL] but merely extended it to include single instances of conduct."[16]

The first prong of the UCL covers any business act or practice that is unlawful. "To bring an unfair competition claim based on the first prong of section 17200, a plaintiff must allege and establish all requisite elements which constitute a violation of the underlying statute."[17] The underlying statute may be civil or criminal, and there is no requirement that it relate to the realm of unfair competition.[18] Thus, the "unlawful" prong of the UCL is extraordinarily broad, allowing a plaintiff considerable latitude in finding a basis for a UCL cause of action.

The second prong of the UCL prohibits "unfair" business acts or practices. The word "unfair" is seemingly an all-inclusive term, and is not easily defined to yield a reliable and predictable standard. The California Supreme Court has struggled with the task of administering a test to determine whether or not an act in question is sufficiently unfair to violate the UCL.[19] Furthermore, the act in question may be unfair even if it is not unlawful.[20] The statute is written in the disjunctive (using the word "or") and thus only requires a violation of one of the prongs for a violation of the statute. The legislative use of the general term "unfair" has substantially broadened the basis from which a plaintiff can state a cause of action.

The third prong of the UCL, "fraudulent," is the least ambiguous, and therefore does not merit considerable discussion. Included within this term are causes of action for fraud and misrepresentation. Arguably, this prong is unnecessary because anything that falls within the reach of the fraudulent prong would likely also be deemed an "unfair" business practice.

Thus, the UCL affords a plaintiff considerable leeway in phrasing a pleading because of the variety of ways to violate the statute. The

15. Cel-Tech Communications, Inc.v. L.A. Cellular Tel. Co., 973 P.2d 527, 549 (Cal. 1999) (Kennard, J., concurring and dissenting).

16. *Id.* at 550.

17. Kim, *supra* note 12, at 200.

18. *See, e.g.*, Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086 (Cal. 1998) (holding the sale of cigarettes to minors was a violation of a predicate statute sufficient to support a UCL cause of action).

19. *See infra* text accompanying notes 82-95.

20. *Cel-Tech Communications, Inc.*, 973 P.2d at 540.

legislative intent in drafting the UCL was to write a broad statute that would encompass most or all methods of unfair competition—even those unknown at the time of its drafting.[21] However, the broad scope of the UCL has allowed plaintiffs to pervert the original legislative intent. The UCL has been asserted as a cause of action for tactical advantages in trial, increasing the leverage for settlement, and the permissible scope of discovery.[22] There is no current deterrent for a plaintiff's attorney not to do this, as he may, "without tangible evidence of harm, sue a defendant for being 'unfair' and know the allegations will rocket past summary judgment."[23] Thus, the breadth of the UCL means that a plaintiff has nothing to lose by adding a UCL cause of action to his complaint—an invitation for abuse.

B. The UCL's Over-Inclusive Standing Requirement

The UCL is privately enforceable.[24] A claim under the UCL may be brought "by any person acting for the interests of itself, its members or the general public."[25] This limitless standing requirement furthers the potential for abuse, as "[t]hose suing on behalf of the general public can range from plaintiffs having a narrow dispute with a defendant in a business context, who tack on the [UCL] claim for discovery and settlement advantages, to plaintiffs serving a true private attorney general function."[26]

This private right of action is not found in the analogous federal statute, the Federal Trade Commission ("FTC") Act.[27] "[C]oncern over the breadth of the 'unfairness' standard in the FTC Act led Congress to severely limit enforcement of the statute to actions by the Federal Trade Commission rather than by private litigants."[28] In *Holloway v. Bristol-Myers Corp.*[29] a federal appeals court explained the rationale behind limiting enforcement of the FTC Act to the government:

> [The] breadth of prohibition [against unfair practices in the FTC Act] carried with it a danger that the statute might become a source of vexatious litigation. Expertise was called for . . . to avoid using

21. *Id.*
22. Sullivan, *supra* note 5, at 22.
23. *Id.*
24. CAL. BUS. & PROF. CODE § 17204.
25. *Id.*
26. Sullivan, *supra* note 5, at 22.
27. *See* 15 U.S.C. §§ 45 *et seq.* (1994).
28. David M. Axelrad et al., *California's "Little FTC Act": Benefitting Consumers, or Lawyers?*, LEGAL BACKGROUNDER, Dec. 4, 1998, at 17.
29. 485 F.2d 986 (D.C. Cir. 1973).

> the statute as a vehicle for trivial or frivolous claims.... Private litigants are not subject to the same constraints. They may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program. The consequence would burden not only the defendants selected but also the judicial system. It was to avoid such possibilities... that Congress focused on the FTC as an exclusive enforcement authority.[30]

Of the other states that have enacted similar statutes as California's UCL, few have the broad standing provisions of the California statute. Today, all fifty states have some version of a consumer protection statute, or "little FTC Act."[31] Not every analogous state statute offers a private plaintiff a right of action. However, California's UCL authorizes standing for a private party without the limitations that are imposed in other states. "As a 1996 report to the California Law Review Commission notes: 'None of the 16 other state jurisdictions with their own version of California's Unfair Competition Act give private attorney general status to any person without qualification.'"[32]

The crux of the problem is that the California UCL has no requirement that a private plaintiff have been personally harmed, or even have a personal stake in the litigation, before a UCL action can be asserted.[33] Additionally, if the plaintiff is basing his or her UCL suit on the "unlawful" prong of the statute, thus claiming that the violation of another statute is grounds for a violation of the UCL, the underlying statute does not need to confer a private right of action for the UCL claim to be justiciable.[34] This is true even when the underlying statute in question is a criminal law.[35] This means that there is essentially no standing requirement for the UCL, as any plaintiff may file a suit—so long as they claim to be doing so in the interests of the general public. "The result is that any person may become a quasi-prosecutor, selecting deep pocket targets at will for enforcement of section 17200's broad proscriptions."[36]

30. *Id.* at 990, 997-98.

31. PRIDGEN, CONSUMER PROTECTION AND THE LAW app. 3A (1997).

32. Axelrad et al., *supra* note 28, at 3 (quoting *Unfair Competition Litigation*, 26 CAL. L. REVISION COMMISSION REP. 207 (1996)).

33. *See* People v. Cappuccio, Inc., 251 Cal. Rptr. 657, 662-63 (Cal. Ct. App. 1988); Axelrad et al., *supra* note 28, at 2.

34. Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1093 (Cal. 1998).

35. *Id.* at 1094-95.

36. Axelrad et al., *supra* note 28, at 3.

II. Examples of How the Aforementioned UCL Problems Have Allowed Plaintiffs to Enforce Their Own Public Policy Agenda

This next section will consider how the problems of the UCL have increasingly allowed plaintiffs to enforce their private public policy concerns. I will look at three cases in chronological order. In these cases I will identify the problems of over-inclusive standing and broad statutory prohibition, and show how one or both of these problems have created the third problem of private enforcement of individual policy goals.

A. *Committee on Children's Television, Inc. v. General Foods Corp.*

In *Committee on Children's Television, Inc. v. General Foods Corp.*,[37] the plaintiffs sued the maker of breakfast cereals claiming "fraudulent, misleading and deceptive advertising in the marketing of [these] sugared breakfast cereals."[38] The plaintiffs included The Committee on Children's Television, Inc. and the California Society of Dentistry, as well as individual adults and children.[39] The suit was filed as a class action on behalf of "California residents who have been misled or deceived, or are threatened with the likelihood of being deceived or misled"[40] by the defendant in connection with the marketing of sugared cereals. The cereals in question were "Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles—which contain from 38 to 50 percent sugar by weight."[41] The first cause of action, based upon the UCL, alleged that the defendant engaged in a false advertising program, capitalizing on the susceptibilities of children, to "induce them to consume products which, although promoted and labeled as 'cereals' are in fact more accurately described as sugar products, or candies."[42]

It should be apparent that the distinction between a "candy breakfast," and a cereal that contains a substantial amount of sugar, is an individual subjective determination—not the basis for a claim of false advertising. It seems clear that the impetus behind the plaintiffs' complaint had little to do with false advertising, but instead was a desire to advance their own policy goals: namely to stop the

37. 673 P.2d 660 (Cal. 1983).
38. *Id.* at 663.
39. *Id.*
40. *Id.* at 663-64.
41. *Id.* at 664.
42. *Id.*

advertising that enticed children to eat sugar-based cereals for breakfast, and therefore, curb the practice itself. This assertion is substantiated by the fact that one of the plaintiffs in *Children's Television* was the California Society of Dentistry for Children.[43] While encouraging children to eat sugar-based breakfasts is clearly not illegal, the plaintiffs were able to use the UCL to successfully state a cause of action to enjoin this practice.[44] Thus, *Children's Television* is an early example of a plaintiff capitalizing upon the flaws of the UCL to advance his own policy goals.

The broad scope of the UCL is partially responsible for the outcome in *Children's Television.* The court stated: "The term 'unfair competition' receives a broad definition... [and] is not confined to anti-competitive business practice but is equally directed toward 'the right of the public to protection from fraud and deceit.'"[45] In theory, this sounds like a good idea, but in this case, the plaintiff's cause of action is likely based upon a violation of his own policy goals under the guise of a UCL violation.

The primary significance of *Children's Television* is that it was the first case to hold that the UCL granted unqualified standing to a private party.[46] The plaintiffs in this case were not business competitors or even an allegedly harmed consumer of breakfast cereals, but instead it was a group of private organizations. Upset with the defendant for allegedly exploiting the susceptibility of children, and encouraging them to eat a breakfast with a high sugar content, the plaintiffs had standing to file suit under the UCL.[47] The plaintiffs suffered no personal harm, yet the court states "[a UCL suit may proceed] without individualized proof of deception, reliance and injury."[48] Thus, interpreting a virtual lack of any standing requirement, the court permitted this group of private plaintiffs to initiate a lawsuit aimed at advancing the policy goal of one faction of society.

Brought in 1983, this case is an early example of the court's willingness to broadly interpret the UCL's standing provision, and

43. *Id.*
44. *Id.* at 676-77.
45. *Id.* at 667 (emphasis omitted).
46. *Id.* at 667-68 (elevating to a holding, dicta from Barquis v. Merchants Collection Ass'n, 496 P.2d 817, 828 (Cal. 1972)).
47. *Children's Television*, 673 P.2d at 667-68.
48. *Id.* at 668-69.

was highly influential in the court's subsequent decision on standing in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*[49]

B. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*

Even more than *Children's Television*, *Stop Youth Addiction* is a blatant example of a private plaintiff abusing the UCL to advance his own policy goals. The plaintiff in this case, a private citizen, used the UCL to sue defendant Lucky Stores for allegedly selling cigarettes to minors in violation of California Penal Code section 308.[50] The plaintiff claimed that because Lucky Stores sold cigarettes to minors, who eventually became addicted to smoking, and illegally profited from these sales, that the defendant should therefore pay back these ill-gotten profits, as restitution to the State of California.[51] The court—rejecting the defendant's arguments of plaintiff's lack of standing and the legitimate policy concerns of allowing this suit to proceed—held for the plaintiff.[52] While this case would have been proper if it had been advanced by a public plaintiff such as the state attorney general, allowing a private plaintiff to essentially enforce criminal law is an abuse of the UCL and a dangerous precedent for the court to set. The UCL "was certainly not intended to encompass criminal proceedings lying within the exclusive, constitutionally assigned powers of public prosecutors."[53]

The defendant in *Stop Youth Addiction* made essentially the same argument that the D.C. Circuit made in their holding in *Holloway v. Bristol-Myers Corp.*; namely, that a private plaintiff should not have standing to bring a cause of action based upon the violation of a criminal statute.[54] Lucky Stores argued that the court should look to the legislative intent of the underlying statute—"if the Legislature did not include an express private right of action in the enforcement scheme for the underlying law," the court should not allow a private UCL action to proceed based upon this law.[55] The majority in *Stop Youth Addiction* rejected the defendant's argument, stating that "whether a private right of action should be *implied* under [the predicate] statute . . . is immaterial since any unlawful business

49. 950 P.2d 1086 (Cal. 1998).
50. *Id.* at 1089.
51. *Id.*
52. *Id.* at 1086-1102.
53. *Id.* at 1109 (Brown, J., dissenting).
54. *Id.* at 560-76; Holloway v. Bristol-Myers Corp., 485 F.2d 986, 990, 997-98 (D.C. Cir. 1973).
55. *Stop Youth Addiction, Inc.*, 950 P.2d at 1091.

practice... may be redressed by a private action charging unfair competition in violation of Business and Professions Code sections 17200 and 17203."[56] This is clearly a fallacious argument—the majority in *Stop Youth Addiction* is assuming their conclusion.

Justice Brown's dissent in *Stop Youth Addiction* asserted that granting the plaintiff standing in this case undermined the separation of powers doctrine.[57] Allowing a private party standing to use a criminal law violation as a cause of action

> undermines the separation of powers in multiple ways: by granting private actors the right to vindicate the public interest, by extinguishing the historical limits on the rights of private litigants to invoke the remedial powers of the courts, and by depriving the executive of its constitutionally assigned discretion to enforce the Law.[58]

Thus, the dissent meant that by allowing a private party to enforce criminal law, the court was usurping a power traditionally delegated to the executive (in this case, the power of the public prosecutor to try criminal offenses).[59] "For one arm of government to exercise an 'essential power' of another threatens the constitutional integrity of the coordinate branch. The doctrine of standing serves as a judicial means of preventing one branch from exercising a constitutional power that properly belongs to another."[60]

The dissent further argued that conferring standing to a private party that has suffered no injury contributes to the separation of powers problem.[61] "And so long as a *private litigant* suing under the UCL is able to allege and prove a species of judicially cognizable *harm*, private suits under the UCL do not raise significant separation of powers concerns."[62] At the very least, requiring that a private plaintiff have been personally harmed by the criminal acts in question would limit standing such that UCL suits could not be brought by a party merely seeking to assert their own policy agenda. In the public sector, prosecutors have a duty to use their discretion in charging a defendant with a criminal violation.[63] No such "prosecutorial discretion" is required of a private plaintiff who maintains a UCL suit

56. *Id.* (quoting *Children's Television*, 673 P.2d at 668).
57. *Id.* at 1109-10 (Brown, J., dissenting).
58. *Id.* at 1109.
59. *See id.* at 1109-10.
60. *Id.* at 1110.
61. *Id.* at 1111.
62. *Id.*
63. *Id.* at 1112.

on a criminal law. The dissent raised this point, writing that "[u]nlike prosecutors, whose authority is curbed by established notions of ethical responsibility, private enforcement of the UCL is unchecked and unfettered. The potential for abuse in such a system is manifest."[64] Thus, the defendant in a UCL suit based upon a criminal law violation does not enjoy the safeguards of "detachment, neutrality, and evenhandedness," that would be present had the suit been initiated by a public prosecutor.[65]

The court's expansion of the standing requirement in *Stop Youth Addiction* creates a dangerous precedent. Before the decision in *Stop Youth Addiction*, the California Supreme Court had never held that a private plaintiff had standing to bring suit under the UCL's "unlawful" prong where the predicate statute clearly did not confer a private right of action. *Stop Youth Addiction* not only upheld the problematic over-inclusive standing provision of the UCL, it greatly expanded this provision. Now, any underlying statutory violation, including a violation of criminal law, can be enforced by a private party through the UCL. The court in *Stop Youth Addiction* has created the exact legal world that the D.C. Circuit in *Holloway* warned of: the opportunity for any private member of society to act as a public prosecutor.

It is not difficult to make the connection between the court's holding on the issue of standing, and the potential for a private plaintiff to use the UCL as a means to advance his own policy goals. Stop Youth Addiction, Inc. was a for-profit corporation, established by the attorney for the plaintiff, whose sole shareholder was this attorney's mother.[66] The corporation had no source of funding other than a $1,000 payment that the mother of plaintiff's attorney made to her son in exchange for "stock."[67] The corporation had no other employees and its only business was in filing lawsuits.[68] Additionally, Stop Youth Addiction, Inc. "employed children as decoys in privately run 'sting' operations to obtain evidence of illegal cigarette sales by some or all of the defendants."[69] This "case is one of eight nearly identical suits... [together seeking] more than $50 billion in restitution as well as injunctive relief... against almost 2,000 defendants, most of whom appear to be small retailers. Each suit

64. *Id.*
65. *Id.* at 1113.
66. *Id.* at 1107.
67. *Id.*
68. *Id.*
69. *Id.*

seeks attorney fees."[70] Thus, the plaintiff established a shell corporation with the intent of trying to ameliorate the sales of cigarettes to minors while collecting attorney's fees for himself. The UCL was certainly not drafted to effectuate such a result. Regardless of whether his asserted policy goals were noble or disingenuous, it was unwise to allow him to further these goals in the role of a criminal prosecutor. This result allows any person with a personal vendetta towards a particular industry to use the UCL to achieve vigilante justice.

The second identified UCL problem, its vague statutory language and sweeping scope,[71] is also responsible for allowing this particular plaintiff to further his policy agenda. The plaintiff's UCL claim was based upon the "unlawful" prong of the statute. The unlawful prong, allowing a UCL cause of action for the violation of any other law, is not vague in what it covers. It is, however, extraordinarily broad, "[extending] the statute's reach to 'anything that can properly be called a business practice and at the same time is forbidden by law.'"[72] When a criminal law is used as the predicate statute, the UCL's effect on a defendant "is virtually the same as if [the suit] had been brought directly under the Penal Code."[73] This broad base from which to generate a cause of action, coupled with the virtual lack of any standing requirement, allowed this plaintiff to manipulate the court system in order to achieve his own policy goals.

C. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*

Children's Television and *Stop Youth Addiction* are excellent examples of the UCL's standing requirement allowing an individual to effectuate his own policy goals. Similarly, *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*[74] clearly illustrates how the vagueness of the UCL's statutory prohibitions can be manipulated to further contribute to the problem of a plaintiff using public policy as the basis of his lawsuit.

The parties in this case were competitors in the business of selling cellular telephones.[75] The defendant sold cellular services as

70. *Id.*

71. *See supra* text accompanying notes 11-23.

72. *Stop Youth Addiction, Inc.*, 950 P.2d at 1108 (Brown, J., dissenting) (quoting Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition*, 19 HASTINGS L.J. 398, 408-09 (1968)).

73. *Id.* at 1113.

74. 973 P.2d 527 (Cal. 1999).

75. *Id.* at 532.

well as telephones, whereas the plaintiff only sold telephones.[76] The market for cellular services was a regulated industry, and "[the defendant] [had] a government-protected 'duopoly' status with one other company."[77] Thus, the plaintiffs were not allowed to enter the cellular services market. "In an effort to gain new subscribers for its services and increase overall profits, [the defendant] sold telephones below cost. It lost money on telephone sales but made up for those losses with its increased sales of services."[78] The plaintiffs claimed that "because they are not allowed to sell services, they cannot fairly compete with L.A. Cellular's strategy of selling telephones below cost and recouping the losses with profits on the sales of services."[79] Their lawsuit was based, in part, on the UCL.[80]

This case forced the court to interpret the "unfair" prong of the UCL. The business practices utilized by the defendant were not illegal, and thus, were not susceptible to a cause of action based upon the "unlawful" prong of the UCL.[81] This situation presented the novel query of when an act that is lawful, can nonetheless be deemed unfair.

The court first determined that an act cannot be labeled unfair if the Legislature has "permitted certain conduct or considered a situation and concluded no action should lie."[82] However, clear statutory language was required: "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct."[83] Thus, had there been statutory authorization for the defendant's business practices in question, this would have ended the unfair inquiry.

If the Legislature is silent on the business act in question, the court held that the challenged practice may be considered unfair under the UCL: "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair."[84] Acknowledging that this definition of unfair was still too broad, the court stated that "we believe we must devise a more precise test for determining what is unfair under the unfair competition law. To do so we [may] turn

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 533.
82. *Id.* at 541.
83. *Id.*
84. *Id.* at 542.

for guidance to the jurisprudence arising under the 'parallel' section 5 of the Federal Trade Commission Act."[85] Using section 5 of the FTC Act as a guideline, the court came up with the following test for unfairness under the UCL: "the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or *violates the policy or spirit of one of those laws* because its effects are comparable to the same as a violation of the law, or otherwise significantly threatens or harms competition."[86] This new definition of "unfair" is inconsistent with earlier dicta in *Cel-Tech*, improperly modeled after the FTC Act, and does little to solve the problem of an over-broad law giving a plaintiff a means in which to assert his own policy agenda.

Before crafting this policy-based definition of unfairness, the court earlier warned of the use of public policy in UCL litigation.

> Courts may not simply impose their own notions of the day as to what is fair or unfair.... Vague references to "public policy," for example, provide little real guidance.[87] "Public policy as a concept is notoriously resistant to precise definition, and... courts should venture into this area, if at all, with great care."[88]

The court did not explain this inconsistency when they crafted the definition of unfairness to include "[violations of] the policy or spirit of one of [the antitrust laws]."[89] The only justification given was that this unfairness standard is modeled after the standard used in section 5 of the FTC Act.

The problem with the analogy between California's UCL and the FTC Act is multifaceted. As previously discussed, the UCL has virtually no standing requirement.[90] Conversely, the FTC act is only enforceable by the Federal Trade Commission itself, not private parties. Thus, "the interpretation of section 5 that the FTC has developed is an administrative standard, whose enforcement is subject to the informed discretion of an administrative agency with considerable economic expertise and regulatory experience."[91] The safeguards of prosecutorial discretion and ethical responsibility that are present in an FTC case do not exist in a privately enforced UCL

85. *Id.* at 543 (citing 15 U.S.C. § 45(a)(5)).
86. *Id.* at 544 (emphasis added).
87. *Id.* at 541, 543.
88. *Id.* at 543 (quoting Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992)).
89. *Id.* at 544.
90. *See supra* text accompanying notes 24-36; *Stop Youth Addiction, Inc.*, 950 P.2d at 1095, 1109-12.
91. *Cel-Tech Communications, Inc.*, 973 P.2d at 553 (Kennard, J., concurring and dissenting).

case. Additionally, the FTC cannot sue for restitution or attorney's fees, but is "limited to awarding only prospective relief in the form of a 'cease-and-desist order' instructing the business to modify its future conduct."[92] Contrast this remedy with the massive restitutionary penalties that businesses often face when found liable under the UCL.[93] Finally, while it is clear that the policy underlying the FTC Act is federal antitrust law, "[t]he majority never identifies what body of antitrust law it supposes the Legislature intended to incorporate into [the UCL]: Federal antitrust law? State antitrust law? Some amalgamation of the two?"[94] Thus, it is fallacious to draw an analogy between California's UCL and the FTC Act.

Cel-Tech's new test for unfairness under the UCL exacerbates the potential for a private plaintiff to abuse the UCL to further his own policy goals. Although the plaintiff in this case may have had a legitimate business concern, the court's definition of unfairness will allow subsequent plaintiffs to bring forth UCL cases based upon their own interpretation of the "policy or spirit" of antitrust laws. Additionally, "[a] business seeking to guide its competitive conduct by the majority's standard will be put to the impossible task of deciding whether its conduct, even though not a violation of the antitrust laws, violates the 'spirit' of the antitrust laws."[95] With unlimited standing, a plaintiff now has even more ability to bring a UCL case based upon his own policy agenda; he need only plead that the defendant's conduct violates the spirit of antitrust law—a requirement that can be easily manipulated.

III. The Future of UCL Jurisprudence

"[T]he majority [in *Cel-Tech*] expands potential liability under the UCL for 'unfair' practices, again importing subjectivity into a law that no longer gives fair warning of conduct that may be deemed unlawful."[96] The immediate effect of the court's ruling in *Cel-Tech* will be vast uncertainty among the business community as to what business practices could be found unfair under the UCL.

In the past, the court has given extreme deference to the Legislature, voicing its reluctance to curtail the power of the UCL:

92. *Id.* at 554 (quoting 15 U.S.C. § 45).
93. *Id.*
94. *Id.* at 550.
95. *Id.* at 553.
96. *Id.* at 557-58 (Baxter, J., concurring and dissenting).

> [H]ad the Legislature at any time desired to change the UCL so as to restrict its application... it undeniably had ample time to do so.... [W]henever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope... should the Legislature disagree with [the holding in *Stop Youth Addiction*], it remains free to provide otherwise.[97]

There is no sign that the court will assume a more activist role in the future to combat current UCL abuses. If the court continues to exhibit blind deference to the Legislature, in the face of statutory abuse, then it becomes the Legislature's responsibility to implement the necessary UCL changes.

The most dire future implication of the court's line of UCL holdings is the one that this Note has cautioned against. The court is laying the groundwork for a UCL lawsuit to be brought by a private plaintiff based *solely* on a business practice that he or she dislikes. The result would be disastrous—a state of vigilante justice against unpopular industries.

IV. Solutions to Limit UCL Abuse and Private Policy Enforcement

The first solution to remedy the abuse of using the UCL to further private policy concerns is to elevate the threshold necessary to satisfy the "unfair" prong of the statute. The test for an "unfair" act needs to be amended in one of two ways. After *Cel-Tech*, UCL unfairness suits may be brought based on nothing more than a policy violation. The test for unfairness should not allow a UCL action to proceed on policy alone—there should be a violation of a law in conjunction with a policy violation. Alternatively, if the court is insistent in maintaining the current test for unfairness, they have a responsibility to catalogue the specific policy considerations that, if violated, would form the basis for a UCL cause of action. In this way, a private party could not try to proceed with a UCL claim based on its own notion of correct public policy.

Secondly, the standing requirement needs to be modified to only allow private plaintiffs standing when they can show that they have been personally harmed by the defendant's conduct. The prerequisite of personal injury before a lawsuit can be brought is fundamental in our legal system, and should not be abrogated in this context. A personal harm requirement would eliminate lawsuits by plaintiffs who would have no foundation for standing outside of the UCL. This

97. *Stop Youth Addiction, Inc.*, 950 P.2d at 1092, 1097, 1102.

would also severely limit the potential for a detached, opportunistic plaintiff to sue an unpopular industry.[98]

Finally, the court needs to freely incorporate the unclean hands doctrine of abstention in cases where it is apparent that a plaintiff is misusing the UCL to further his own policy agenda. As the concurrence in *Stop Youth Addiction* underscores:

> [I]njunctive relief is an equitable remedy [and] whether to grant that relief lies in the sound discretion of the trial court.... [If the plaintiff] has initiated the action for reasons other than redressing unfair business practices, or has engaged in extortionate conduct in initiating and/or prosecuting the action, the trial court may well determine that equitable relief should be denied.[99]

A liberally applied unclean hands doctrine could serve as a check on malicious private prosecution of the UCL, analogous to the duties of ethical responsibility and prosecutorial discretion that constrain the actions of the public prosecutor.

Conclusion

California's Unfair Competition Law is no longer being used as it was originally intended. Instead of serving as a tool to combat acts of unfair competition unknown at its inception, the law has evolved to become "a bounty-hunter type regulatory mechanism of enormous elasticity."[100] The UCL's unlimited grant of standing and vaguely defined prohibitions have allowed private parties to use the law to further their own public policy interests. The problems with the UCL must be addressed and corrected to avoid a state of vigilante justice.

98. *Id.* at 1086-102.
99. *Id.* at 1104 (Baxter, J., concurring).
100. Sullivan, *supra* note 5, at 22.

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